Supreme Court of the United States.

DECEMBER TERM, 1868.—No. 22.

The Louisiana Mutual Insurance Co., Plaintiffs in Error,

VERSUS

John P. Tweed, Defendant in Error.

BRIEF FOR PLAINTIFFS IN ERRROR.

WM. M. EVARTS,
OF COUNSEL FOR PLAINTIFFS IN ERROR.

M'GILL & WITHEROW, PRINTERS.

Supreme Court of the United States.

THE LOUISIANA MUTUAL INSURANCE COMPANY,
PLAINTIFF IN ERROR,

vs.

JOHN P. TWEED,
DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

The plaintiff below was insured with the Louisiana Mutual Insurance Company "against loss or damage by fire to the amount of $68,344, on 1,390 bales of cotton contained in the Alabama press, under military guard, in the city of Mobile, Alabama."

The express undertaking of the company was "to make good unto the said insured, his executors, &c., all such loss or damage, not exceeding the amount insured, as shall *happen by fire* to the property, &c., "*provided* always, and it is hereby declared, that this corporation shall NOT be liable to make good any loss or damage by fire which MAY HAPPEN OR TAKE PLACE BY MEANS OF any invasion, insurrection, riot, or civil commotion, or of any military or usurped power, EXPLOSION, earthquake, or hurricane."

Record, fol. 4–5.

The policy is also declared to be "made and accepted in

reference to the terms and conditions hereto annexed," and one of these conditions is as follows:

"This Company will be liable for losses on property burnt by lightning, *but not for any loss or damage by fire happening by means of* any invasion, insurrection, riot, or civil commotion, or of any military or usurped power, *explosion*, earthquake, or hurricane, nor for loss of property of any description by theft during or subsequent to any fire which may occur."

Record, fols. 7–13.

The cotton insured was wholly destroyed by fire, during the running of the policy, and to the action brought to recover for the loss the defence was, that any loss or damage of the insured "resulted from a risk expressly excepted from those assumed by defendants in the policy aforesaid, to wit, from an explosion occurring in premises immediately adjacent to the said Alabama press or yard, which explosion simultaneously destroyed said press and all buildings adjacent to it."

Record, fol. 29.

The state of facts upon which the question of law, whether the loss "*happened*" within the contract of indemnity or within the exception from such indemnity, is as follows:

The cotton insured was stored in the building designated as the "Alabama Warehouse," which is across a street fifty feet wide from the building designated as "Marshall's Warehouse," in which were stored many tons of munitions of war belonging to the United States.

On the 25th of May, 1865, about 3 o'clock, p. m., an explosion, of terrific force and effect, took place in "Marshall's Warehouse," which threw down the walls of the "Alabama Warehouse," and of the building designated as the "Alabama Press or Eagle Mills," as well as of all the buildings within an adjacent area of several squares.

This explosion lighted a conflagration in which the cotton insured was consumed.

Upon this undisputed state of facts, there was some diversity of evidence as to whether the fire was lighted in the

"Alabama Warehouse" by a direct communication thereof from the "Marshall's Warehouse," or whether the flames reached the "Alabama Warehouse" by propagation through the "Alabama Press or Eagle Mills."

As, however, two principal propositions of fact are established by the plaintiff's own proof, and wholly beyond controversy, this circumstantial diversity is insignificant.

These propositions are:

I. That by the direct, instantaneous, and immediate blow of the explosion, the walls of the "Alabama Warehouse," and of the circumjacent buildings, were thrown down, and their combustible contents, including the cotton insured, opened to the devouring flames.

II. That by the direct, instantaneous, and immediate blow of the explosion, a fire was lighted which, in its nearest spread, embraced and consumed the cotton insured.

Upon this state of facts, the learned Judge Durell held, that under the policy the principle, "*causa proxima, non remota, spectatur*," applies; and that, upon this consideration, the fire which consumed this cotton did not "happen or take place by means of an explosion," and gave judgment for the plaintiff below.

Rec., fols. 144, 149.

To correct this error, this writ of error is brought.

Rec., fols. 150, 151.

POINTS.

First Point. It was quite competent for these contracting parties, in adjusting the premium and measuring the risks which should be assumed by the insurers in consideration thereof, to limit the risks thus to be assumed, and define those which were to be borne by the assured, by words of apt and adequate discrimination between the two.

The court, in interpreting this contract in this regard, has no other duty than to accord to the terms of the contract,

which purport to effect this discrimination as the object in view, the reasonable and practical sense which is appropriate to the known situation of the subject insured, and to the opposing interests of the contracting parties.

The fact that one form of the risks, which was contemplated by the parties as so probable as to attract a particular attention thereto, and a particular provision therefor, was, apparently, left *uninsured*, and thus, in consideration of the premium saved, to be borne by the assured, presents the question to the court under no different aspects than it would have been subject to, had the risks been divided, by the assured, between *two different insurers*.

Upon this unquestionable proposition, then, the sole judicial question is, under which of the risks described in this policy—that insured against, and that excepted from the indemnity of the policy—does the loss, occurring in the conflagration lighted by the explosion of the munitions of war, under the recognized rules of insurance law for distributing the burden of an accrued loss between different sets of underwriters, or between underwriters and the assured, properly fall.

SECOND POINT. A *general* solution of the problems of doubt and difficulty, which the infinite variety of the actual circumstances of marine and fire risks has raised for judicial decision, has been thought to have been reached in the maxim, "CAUSA PROXIMA, NON REMOTA, SPECTATUR."

But this rule has itself been proved to cover some fallacies which lurk under every generality.

The most celebrated judges have given a contrary application of the maxim upon identical states of fact.

The controversy, whether nearness of *time* or closeness of *efficiency* in the competing causes, satisfied the maxim, and the still larger controversy, as to what secondary and subordinate agencies were to be treated as swallowed up in a PREDOMINATING CAUSE, have resulted in closer practical definitions of the desired discrimination, which may be trusted as the considerate and practical rules of the law in the premises.

They are thus stated by a most judicious and sensible commentator, Mr. Phillips:

"I understand the result of the jurisprudence to be, that in case of the concurrence of different causes, to one of which it is necessary to attribute the loss, it is to be attributed to the efficient predominating peril, whether it is or is not in activity at the consummation of the disaster."

1 Phill. Ins., § 1132, p. 677.

"If, when different parties, whether the assured and the underwriter, or different underwriters, are responsible for different causes of loss, which concur in the loss, and the damage by each cause cannot be distinguished, the party responsible for the predominating efficient cause, or that by which the operation of the other is directly occasioned as being merely incidental thereto, is liable to bear the loss."

Ibid., § 1137, p. 681.

THIRD POINT. A recurrence to the CONTRACT, by whose terms the rights of the parties are measured, will show a most intelligent and circumspect attention to the true description of the risks excepted from the insurance.

This intelligence and circumspection are shown:

I. In the fitness and sufficiency of the words used to accomplish the desired discrimination, so that the sense, *to the plain apprehension of practical men*, is neither obscure, equivocal, nor incomplete.

II. In the comprehension of, and attention to, *the legal distinctions and criticisms which judicial decisions have applied to the subject with which the contract deals.*

III. In the *association* in which the excepted cause of fire by means of EXPLOSION is found; for these other causes of fire for which the insurers refuse indemnity, are, indisputably, in their nature and mode of operation, neither direct nor immediate *processes* of ignition or combustion, but are either moral or physical AGENCIES, in the progressive operation of which fire may be, peradventure, lighted or propagated.

When, therefore, the contracting parties, with such fullness, intelligence, and circumspection, have described and defined the loss by fire, which they agree shall be excepted from the stipulated indemnity, the court is saved all the doubts or difficulties of *interpretation*, which form the staple of so many cases.

Whatever difficulty, then, can possibly arise to disappoint or confound the *intent* of the parties in their contract, in their mutual understanding of it, must be referred to some strange or obscure *state of facts*, which has eluded all their forecast and sagacity.

FOURTH POINT. But the established facts of the case—indeed the plaintiff's own evidence, in his own view of it—make neither doubt, difficulty, obscurity, or uncertainty, as to the relation of the primary cause and the subordinate means by which the property insured was destroyed by fire.

I. The security against fire of the property insured is first invaded by the terrific explosion of the munitions of war stored in close proximity.

This explosion, itself and instantly, denudes the combustible property insured, of the protecting walls of the building, within which the terms of the insurance require it to be, and exposes it, naturally and probably, to the incursion of fire, if fire shall happen.

II. The explosion, itself and instantly, lights the fire which, as a single, progressive, uninterrupted, and irresistible conflagration, consumes the property insured.

III. No *new* cause, influence, agency, or means, is interposed between (1) the explosion and the lighting of the fire which it caused, or (2) the lighting of the fire and the destruction by its flames of the property insured, to which any efficiency towards, or any responsibility for, the loss can be imputed.

The suggestion that the *propagation* of the flames, by the course of the wind, or the intermediate combustible matter,

introduces a new *cause* or *means* of loss, (which was made in the court below, and may be repeated in argument here,) is only important as indicating the *absolute absence* of any efficient or responsible cause, in the sense of insurance law, to relieve the EXPLOSION from being the predominating and controlling cause, and the effectual means, of the destroying fire.

IV. Not only did no new cause or means intervene to share the responsibility of the loss, but from the moment of the explosion, in the actual situation produced by the explosion, the property insured was already doomed and, in value, actually destroyed.

The natural, necessary, irresistible operation of the causes set at work, "by means of the explosion," involved the destruction of the property insured, without the aid of any coöperative agency whatever.

The intervention of some imaginable new cause or agency might, perhaps, have set back and counteracted the means of destruction which the explosion awakened, and thus the property have been saved "*ex incendio.*"

But the absence of such a counteracting agency can never be set up as an efficient and operative agency to bear the responsibility of the loss.

FIFTH POINT. An examination of the authorities will show that, within any accepted interpretation of the rule of "CAUSA PROXIMA, NON REMOTA, SPECTATUR," the loss in this case was by "fire which happened or took place by means of explosion."

In *General Mutual Insurance Company* vs. *Sherwood*, (14 How., p. 367,) the question was whether a contribution, by a vessel insured to make good an injury to another vessel by collision, was a charge upon the underwriters as a loss by the perils of the sea as a *proximate cause.*

Mr. Justice Curtis, delivering the opinion of the court, says: "This negligence is, therefore, the fact without which the loss would not have been suffered by the plaintiff, and by its operation the loss is suffered by him. In the strictest sense, it causes the loss to the plaintiff. The loss of the owners of the Vir-

ginia was occasioned by a peril of the sea, by which their vessel was injured. But nothing connects the plaintiff with that loss, or makes it his, except the negligence of his servants. Of his loss, this negligence is the only efficient cause, and in the sense of the law it is the proximate cause."

In *Peters* vs. *Warren Insurance Company*, (14 Pet., 110,) Mr. Justice Story says: "Suppose a vessel insured against fire only is struck by lighting, and takes fire, and in order to save her from utter destruction she is scuttled and sunk in shoal water, and she cannot afterwards be raised; it might be said that the immediate cause of the loss was the scuttling; but in a judicial sense it would be attributed to the fire, and the underwriters would be held liable therefor. Suppose another case, that of a vessel insured against all perils but fire, and she is shipwrecked by a storm on a barbarous coast, and is there burnt by the natives; it might be said that the proximate cause of the loss was the fire; and yet there is no doubt that the underwriters would be held liable on the policy, upon the ground that the vessel had never been delivered from the original peril of shipwreck." (p. 110.)

"The question in all cases of this sort is, what, in a just sense, is the proximate cause of the loss?" (p. 108.)

Magoun vs. *New England Marine Insurance Company*, 1 Story, R., p. 157.

"All the consequences naturally flowing from the peril insured against, or incident thereto, are properly attributable to the peril itself. If there be a capture, and before the vessel is delivered from that peril she is afterwards lost by fire, or accident, or negligence of the captors, I take it to be clear, that the whole loss is properly attributable to the capture. It would be an over-refinement and metaphysical subtlety to hold otherwise, and would shake the confidence of the commercial world in the supposed indemnity held out by policies against the common perils." (Story 1, 164.)

Montoya vs. *The London Assurance Company*, 6 Exch. R., 451; 4 E. L. and Eq. Rep., 500.

The insurance was on tobacco, forming part of a cargo, consisting of hides and tobacco. The vessel shipped a quantity of sea water, by which the hides, upon the top of which the packages of tobacco were stowed, were thoroughly wetted; but the tobacco was never in contact with the water, and sustained no damage directly from that cause. The hides became putrid, and emitted a fetid odor, which, pervading the tobacco and destroying its flavor, rendered it unmerchantable.

Held, this loss was to be attributed to the perils of the seas as its proximate cause.

Chief Justice Duer, in *Tilton* vs. *Hamilton Fire Insurance Company*, (1 Bosw., 367,) reviews the cases and lays down, as the result, that,

"The insurer must satisfy every loss which is shown to have been, although not a necessary, a natural consequence of the peril insured against; and by natural is evidently meant a usual and probable consequence, and such, therefore, as it is reasonable to believe was in the contemplation of the parties when the insurance was effected." (Page 383.)

Brady vs. *The Northwestern Insurance Company*, 11 Mich., 425.

"A policy of insurance against fire covers all loss which necessarily follows from the occurrence of a fire, whenever the injury arises directly or immediately from the peril, *or necessarily from incidental and surrounding circumstances, the operation and influence of which could not be avoided.*"

In the case of *Lewis* vs. *Springfield F. & M. Ins. Co.*, (10 Gray,) the supreme court of Massachusetts had occasion to consider the immateriality of a mere interval of *time* in the course of the consummation of the peril, as bearing upon the question of the operative cause of the loss.

"Insurance against fire was effected on goods 'contained in a granite store;' one of the walls gave way, and half of the store and the whole of the adjoining building fell. Before there was time to remove the goods, fire broke out in that building. *Held*, that the insurers were liable for damage from

fire, and from water used to extinguish it, to goods not displaced or injured by the fall."

"All the plaintiff's stock was in their store, just as the defendants contend they warranted that it should be, when the partition between their own and the adjoining store began to give way. That was the commencement of one common and general disaster. The fire, and the falling of the walls and of other parts of the two stores, which immediately followed, were not separate and independent events, but were merely parts and successive circumstances in the progress of a single calamity. Though the cause and origin of the fire may perhaps be satisfactorily conjectured, the precise moment when it was kindled is not known; but the interval which elapsed before it was discovered, after the crash of the buildings had been heard, was certainly very brief. The witnesses who testified of it varied in their estimate of its duration from fifteen to forty minutes. This slight difference of opinion on a mere matter of judgment of the lapse of time is really of no importance. The material fact is, that the flames broke out and burned the plaintiffs goods before there could have been any possible interposition for their safety, and must thus be considered as having occurred substantially at the same time with the other incidents of the disaster. They were all blended together in one catastrophe, and constituted a single event, upon a due consideration of which the rights of all parties are to be determined." (10 Gray's Rep., p. 159.)

In *Strong* vs. *The Sun Mutual Insurance Company*, (31 N. Y., 103,) the Court of Appeals of the State of New York held that where, by a contract, the insurers are "not to be liable *for* the bursting of the boilers," that which is excepted from the risk of the insurers, by the use of such language, was any damage resulting as a consequence of the bursting of the boilers.

City Fire Insurance Company vs. *Corlies*, (21 Wend., 367.) A destruction of merchandise insured, by the blowing up with powder of a building in which it is stored, under the

direction of a chief magistrate of a city, to prevent the spread of a conflagration, was held to be a loss by fire within the policy.

The leading case, touching directly, in its circumstances, the question now under judgment, is that of *St. John* vs. *American Mutual Fire and Marine Insurance Company*, considered in the Superior Court of New York, (1 Duer R., 371,) and in the Court of Appeals, (1 Kern., 516.)

"When it is provided by the conditions annexed to a policy of insurance against fire, that the company shall not be liable 'for any loss occasioned by the explosion of a steam-boiler, or explosions arising from any other cause, unless specially specified in the policy,' although fire may be the proximate cause of the loss that is claimed, the company is not liable when it appears that the fire was directly and wholly occasioned by an explosion." (Head-note in Superior Court.)

"The resulting destruction followed from the original casualty, without the intervention of any new cause, [illegible] from the nature and condition of the subject [illegible] the casualty."

"It was urged upon the argument, that as fire w[illegible] means of destruction of the property in questi[illegible] could not look back beyond the fire, upon the fa[illegible] ple, '*causa proxima, non remota, spectatur.*' It is true that, if the policy contained no exception, th[illegible] clearly have been a loss by fire." (Johnson, J.,

SIXTH POINT. It is apparent, in the light of th[illegible] ties, that the insurers undertook, by the careful and full expression of the traits of the loss which they excepted from the stipulated indemnity, to exclude all opportunity of refinement and subtlety.

In terms, they secured for themselves exemption from liability, although FIRE was *the immediate, direct, and exclusive agent of destruction operating upon the insured property*, and althqugh the relation which EXPLOSION bore to this consum-

fire, and from water used to extinguish it, to goods not displaced or injured by the fall."

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"The resulting destruction followed from the original casualty, without the intervention of any new cause, and followed from the nature and condition of the subject at the time of the casualty."

"It was urged upon the argument, that as fire was the actual means of destruction of the property in question, the court could not look back beyond the fire, upon the familiar principle, '*causa proxima, non remota, spectatur.*' It is undoubtedly true that, if the policy contained no exception, this loss would clearly have been a loss by fire." (Johnson, J., p. 523.)

SIXTH POINT. It is apparent, in the light of these authorities, that the insurers undertook, by the careful and full expression of the traits of the loss which they excepted from the stipulated indemnity, to exclude all opportunity of refinement and subtlety.

In terms, they secured for themselves exemption from liability, although FIRE was *the immediate, direct, and exclusive agent of destruction operating upon the insured property*, and although the relation which EXPLOSION bore to this consum-

mating cause was merely the opening cause, *by means of which the destroying fire should happen or take place.*

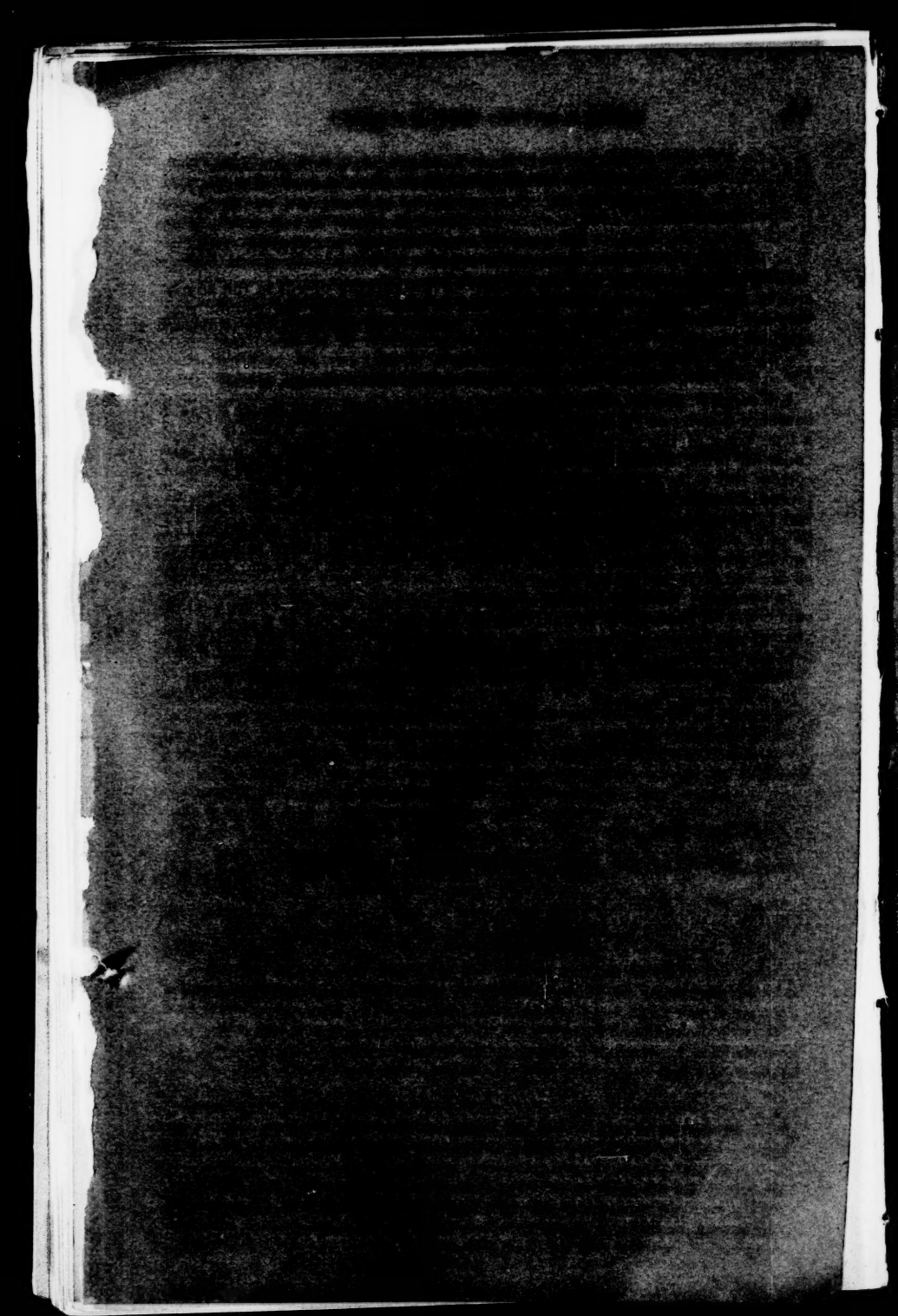
It is impossible to conceive a case in which the frame of this exception shall have, in all its parts, its apt and natural operation, according to the fair understanding of the contracting parties, to exempt the insurers, if they are to be held liable for this loss.

If the assured had, by his contract, himself borne all losses by fire other than such losses as are fairly embraced within the terms of this exception, and had stipulated for indemnity from the insurers, "*to make good any loss or damage by fire which may happen or take place by means of any invasion, insurrection, riot, or civil commotion, or of any military or usurped power, explosion, earthquake, or hurricane,*" what court could tolerate the underwriters in defending against a loss under the circumstances of this case?

Unless, then, insurance companies have no rights, under their contracts, that courts are bound to respect, the same rule of construction must protect the underwriters under this clause of exemption, which would have held them, had it expressed their engagement.

SEVENTH POINT. The judgment below should be set aside, and judgment given for the defendants below with costs.

WM. M. EVARTS,
Of Counsel for Plaintiffs in Error.



TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. [redacted].

THOMAS W. PERRY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED SEPTEMBER 14, 1896.